(3)

No. 04-640

Supreme Court, U.S.
FILED
DEC 10 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

1690 COBB L.L.C. d/b/a WATERPIPE WORLD,
and ERIK CLABAUGH,
and
INSERECTION, A FANTASY STORE,
and ERIK CLABAUGH,

Petitioners,

v.

THE CITY OF MARIETTA, BILL DUNAWAY, in his official capacity as Mayor of THE CITY OF MARIETTA, BETTY L. HUNTER, PETE WALDREP, JOHNNY SINCLAIR, ANDY MORRIS, ANTHONY COLEMAN, JIM KING, and PHILIP GOLDSTEIN, in their official capacity as Members of THE MARIETTA CITY COUNCIL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF GEORGIA, COBB COUNTY

BRIEF IN OPPOSITION

DOUGLAS R. HAYNIE
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QUESTIONS PRESENTED

1. Does the State of Georgia's ban on the dissemination of sexual devices to adults violate petitioners' substantive due process rights as guaranteed by the Fourteenth Amendment of the United States Constitution and this Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)?

2. Does the City of Marietta's revocation of petitioners' business licenses because of petitioners' past sale of sexual devices to adults violate petitioners' rights to continue to disseminate non-obscene expressive works protected by the First and Fourteenth Amendments to the United States Constitution?

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Respondents, The City of Marietta, Bill Dunaway, in his official capacity as Mayor of the City of Marietta, Betty L. Hunter, Pete Waldrep, Johnny Sinclair, Andy Morris, Anthony Coleman, Jim King, and Philip Goldstein, in their official capacity as Members of the Marietta City Council, (hereinafter referred to as "Marietta"), respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the Superior Court of Cobb County of the State of Georgia in this case.

DENIAL OF EMERGENCY APPLICATION FOR STAY

On October 29, 2004, Petitioners filed an Emergency Application with the Court for a Stay of Enforcement of the judgment issued by the Supreme Court of Georgia and same was denied by Honorable Justice Kennedy on November 4, 2004. *See* Exhibit "A".

DISCUSSION OF FACTS AND COURSE OF PROCEEDINGS BELOW

The litigation between the City of Marietta and the adult entertainment clubs located within the City of Marietta, Georgia began in 1994 when the City of Marietta adopted an Adult Entertainment Ordinance. Following the adoption of the Ordinance, three adult entertainment clubs within the City of Marietta challenged the Ordinance adopted by the City, resulting in a decision by the Supreme Court of Georgia, *Goldrush II, et al. v. City of Marietta, et al.*, 267 Ga. 683, 482 S.E.2d 347 (1997), in which the Ordinance was upheld over challenges similar to those raised in the instant case. Thereafter, the owners applied for Certiorari in the United States Supreme Court, which was denied on October 6, 1997. *See* Exhibit "B".

The City of Marietta states to the Court that the business licenses in this case, unlike most cases, constitute a contract between the City of Marietta and Petitioners in that there are written and signed stipulations attached to the licenses. That is, Marietta insisted that Petitioners agree to certain written conditions and stipulations prior to the issuance of the licenses and such stipulations have been attached to the licenses and constitute a contract between Petitioners and the City of Marietta. The trial court specifically held that Petitioners violated stipulation number six through the commercial sale of items which constituted a public nuisance. It was not necessary for the court to hold the items obscene but only necessary for the court to hold that the sale of such items, in a commercial establishment, violated Paragraph Six of the signed written stipulations attached to the license. In addition, based upon the facts in the record, the trial court also held that the sale of such items violated stipulation number seven which prohibited the sale of any sexually oriented items in more than twenty percent (20%) of the floor space of the store. Factually, the trial court found that such items constituted forty-nine percent (49%) of the floor space of the premises. Based upon the factual findings in this case, it is not necessary for the Court to reach the constitutional issues due to the violation by Petitioners of the contract conditions between the parties.

In addition, litigation between the City of Marietta and the Applicant herein resulted in a decision by the Supreme Court of Georgia this summer. In that case, the City of Marietta obtained a temporary injunction requiring closure of the store for the sale of items which constituted a public nuisance. *See Inserection v. City of Marietta*, 278 Ga. 170, 598 S.E.2d 452 (June 7, 2004). Interestingly, Petitioners did not appeal the decision, therefore it is final. While the Georgia

Supreme Court dismissed the appeal based on mootness, Petitioners raised identical issues in the Georgia case that are being raised in this case.

The facts in this case have been reviewed by three reviewing courts and all three have denied relief to the Petitioners in this case. The Marietta City Council, following proper notice to the license holders, held a license revocation hearing. At the hearing, each license holder was represented by counsel, cross-examined all witnesses and was given a full and complete hearing on the matter. Following the hearing, the Marietta City Council unanimously voted to revoke the licenses. Thereafter, the full record in this case was reviewed by the following courts:

1. *Cobb County Superior Court.* Judge S. Lark Ingram reviewed the record and upheld the license revocations.

2. *Georgia Court of Appeals.* A three judge panel of the Georgia Court of Appeals reviewed the record in this transcript, and the same arguments raised by Petitioners here, and found no reversible error and no reason to disturb the judgment of the Superior Court of Cobb County.

3. *Supreme Court of Georgia.* The seven justices of the Supreme Court of Georgia reviewed the record in this case and found no reason to grant certiorari or a stay, and affirmed the license revocations in this case over the legal arguments which are identical to those raised by Petitioners herein.

FACTUAL ISSUES IN RECORD BELOW

I. Waiver By Contract

Being suspicious of the items which the Petitioners/ Licensees might be selling through their general merchandise license, the City of Marietta required the Petitioners to sign an agreement agreeing not to sell certain items. The agreement is attached to the license and incorporated by reference into the license. The two primary conditions at issue here are stated as follows:

6.

> Licensee agrees that it will not sell, display or have on the premises any instruments, devices, paraphernalia, products, article or articles which are designed, sold or viewed for use in connection with "specified sexual activities" as defined in the Marietta Adult Entertainment Code or which are sold or marketed primarily for stimulation of human genital organs.

7.

> Licensee agrees that it shall not:
>
> (a) Have twenty percent (20%) or more of its total retail floor space which is open to the public used for the sale of adult videos or other adult items defined in Section 8-20-020 of the Code of the City of Marietta.

(b) Derive more than twenty percent (20%) of its revenue from the sale of adult videos or other items defined in Section 8-20-020 of the Code of the City of Marietta, and

(c) Have more than twenty percent (20%) of its stock in trade diverted to adult videos or other items defined in Section 8-20-020 of the Code of the City of Marietta.

The City of Marietta has stated in each court that the signed license stipulations constitute a waiver by contract whereby the licensees, as a condition of the issuance of such license, waived the constitutional issues in this case and voluntarily agreed to the limitations set forth above. Not only did the licensees sign the conditions, the attorney for the licensees, Mr. Alan I. Begner, likewise signed and consented to the conditions.

II. Transcript Of Evidence

A transcript of evidence from the hearing was prepared based upon the license revocation heard by the Marietta City Council. Again, the attorney for the Petitioners/Licensees, Mr. Alan I. Begner, represented the Petitioners/Licensees at such hearing, cross-examined witnesses, was authorized to present evidence and argument and was granted a full due process hearing. A Superior Court judge and Georgia's two appellate courts have fully reviewed the transcript of evidence and found no deficiencies either in the process of the hearing or in the final judgment of the hearing.

III. Rule 15.2 Correction Of Facts

Petitioners state on pages 16 and 17 of their petition that there have been "alleged criminal violations" and "past violations of law" involved in this case. Such statements are factual inaccuracies as there have been no alleged criminal law violations at any level in this case nor were the Petitioners' business licenses revoked due to alleged criminal law violations.

REASONS FOR DENYING THE PETITION

I. *Lawrence v. Texas* Does Not Create A New Fundamental Liberty Interest.

Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003), does not create a new fundamental right to private sexual intimacy. The holding in *Lawrence* is only that substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct. *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 815 (Jan. 28, 2004). As Justice Scalia points out in his dissent in *Lawrence*, nowhere in the majority opinion does the Court characterize the right to engage in homosexual sodomy as a fundamental right nor does it state that there is a right to private sexual intimacy. *Lawrence*, 539 U.S. at 586, 123 S. Ct. at 2488. The *Lofton* court stated that it is "particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis." *Lofton*, 358 F.3d at 816. The Court in *Lawrence* did not follow *Glucksberg* fundamental-rights analysis nor did it apply strict scrutiny, which is the proper standard when fundamental rights are implicated. Addressing the dissent in

Williams v. Attorney General of Alabama, 378 F.3d 1232, 1237 (11th Cir. July 28, 2004), the Eleventh Circuit states:

> It is telling that the best support for the fundamental-right-to-sexual-intimacy interpretation of *Lawrence* must be assembled from bits of dicta. It is equally telling the dissent cites no language from the opinion – much less language articulating a rule of law – that states with any precision the right that *Lawrence* purportedly held to exist, or the standard of review that it triggers.

The *Williams* court "decline[s] to extrapolate from *Lawrence* and its dicta a right to sexual privacy triggering strict scrutiny. To do so would be to impose a fundamental-rights interpretation on a decision that rested on rational-basis grounds, that never engaged in *Glucksberg* analysis, and that never invoked strict scrutiny." *Id.* 378 F.3d at 1238. Because of the importance and far-reaching impact of declaring a new fundamental right, as shown by the Supreme Court's application of the two-pronged test created in *Glucksberg*, its emphasis on strict scrutiny, and the necessity of specific, well-articulated analysis for courts to follow when it does create a significant precedent, it is clear that no such right was created by or intended by the Court in *Lawrence*, which did not attempt any of these procedures.

II. A Right To Private Sexual Intimacy Would Not Apply To Commercial Sales.

Even if there is some form of a right to sexual privacy created by *Lawrence*, such right does not apply to this case as the Georgia statute prohibits the sale or distribution of sexual devices and in no way addresses the use or possession of such items in a "dwelling or other private places." *Lawrence*, 539 U.S. at 562, 123 S. Ct. at 2475. The Court in *Lawrence* states:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

Id. The above language emphasizes the liberty of persons in private and restricts the bounds of liberty to autonomy of self in freedom of thought, belief, expression, and certain intimate conduct. All of these are private, intangible attributes of humans that in no way relate to commerce or the sale or distribution of products. While such language defines liberty, it also restricts such liberty to a person's intangible freedoms. The Court in *Lawrence* further stresses the limited factual situation it was addressing in that case:

> The present case does not involve minors. It does not involve persons who might be injured or

> coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

Id. 539 U.S. at 578, 123 S. Ct. at 2484. In the present case however, more than just consenting adults in private are involved. Public conduct, minors, and those incapable of consent are involved in the public sale of sexual devices. There is "nothing 'private' or 'consensual' about the advertising and sale of a dildo. And such advertising and sale is just as likely to be exhibited to children as to consenting adults." *Williams*, 378 F.3d at 1238 n.8. *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 93 S. Ct. 2628, 2637 (1973) (holding that Georgia had a legitimate interest in regulating obscene material because the legislature "could legitimately act . . . to protect 'the social interest in order and morality'") (quoting *Roth v. United States*, 354 U.S. 476, 485, 77 S. Ct. 1304, 1309 (1957)).

Moreover, even if there is a fundamental right to sexual privacy, which is not supported by the cases cited by Petitioners, there is a compelling state interest in shielding the public from inadvertent exposure to the intimacies of others and of protecting minors and others legally incapable of consent from sexual abuse. While non-commercial acts may be entitled to a right of privacy, commercial acts have never been entitled to such a right. *See Morrison v. State*, 272 Ga. 129, 526 S.E.2d 336 (2000). Such a right to sexual

privacy does not relate to or infer a corresponding right to the commercial sale of sexual devices at a business premises which is open to the public. Petitioners in this case have cited no reported, un-reversed opinion supporting their argument that there is a constitutionally protected right to commercially distribute items which constitute either a nuisance or the distribution of obscene material. As seen in *Williams* and *Lawrence*, there is no such constitutional right.

III. This Case Does Not Merit An Expansion Of This Court's Ruling In *Lawrence v. Texas*

The case relied upon by Petitioners is inapposite to the circumstances presented in the present action. That is, the ruling in *Lawrence v. Texas* is concerned with the protection of private conduct, not commercial conduct. The Georgia courts have recognized a bright line difference between protection of private and commercial conduct. In *Morrison v. State*, 272 Ga. at 130, 526 S.E.2d at 337, the Supreme Court of Georgia concluded the "right of privacy conferred by our state constitution, like that in the federal constitution, does not extend to commercial sexual activity." It stated:

> Devices within the definition of O.C.G.A. § 16-12-80(c) "are obscene as a matter of law." *Sewell v. State*, [238 Ga. 495], 496(5), 233 S.E.2d 187 (1977). In *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 128, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), the Supreme Court of the United States specifically stated "that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others. [Cits.]" Although *Powell* [*Powell v.*

> *State*, 270 Ga. 327, 510 S.E.2d 18 (1998)] held that Georgia's right to privacy is broader than the federal right, " 'it is not so broad that a person can take it with him to the store in order to purchase obscene material – even though he has the right to possess such material in the privacy of his home.' [Cits.]" *Stall v. State*, 570 So.2d 257, 262 (Fla. 1990) (construing the Florida constitutional right of privacy). Thus, *Powell* does not confer upon Morrison the constitutional right to distribute obscene material.

Morrison, 272 Ga. at 130, 526 S.E.2d at 337. The right to possess obscene material within the privacy of an individual's home is patently distinct from the rights associated with distributing and selling such items to the public in a commercial setting.

While neither *Lawrence v. Texas* nor the due process clause establish that the present case was incorrectly decided, Petitioners specifically agreed not to sell sexual devices as part of their business licenses. Though Petitioners would like for this Court to expand its ruling in *Lawrence v. Texas*, the waiver by contract shown in this record does not warrant such a holding.

IV. The Court Should Decline to Grant Review of This Case Because This Case Presents No Conflict with Any Decision Of This Court, the Eleventh Circuit Court or the Georgia Appellate Courts.

The Superior Court applied the correct standard in determining that the "sex toys and other evidence in this case constitute an obscenity under O.C.G.A. § 16-12-80(c) and that the sale of such items is unlawful under O.C.G.A. § 16-12-80." (Petitioners' Appendix 10a, 20a) Its decision that sexual devices within the definition of O.C.G.A. § 16-12-80(c) are obscene as a matter of law is consistent not only with established precedent in the Georgia appellate courts, *see Morrison*, *supra*; *Chamblee Visuals, LLC v. City of Chamblee*, 270 Ga. 33, 506 S.E.2d 113 (1998); *Paperback Book Mart, Inc. v. State*, 148 Ga. App. 377, 251 S.E.2d 396 (1978); *Sewell v. State*, 238 Ga. 495, 233 S.E.2d 187 (1977), but also with the decisions of the Eleventh Circuit Court of Appeals, *see Williams*, *supra*; *Lofton*, *supra*, and the decisions of this Court. *See 12 200-Foot Reels of Super 8mm. Film*, *supra*; *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 91 S. Ct. 1400 (1971); *United States v. Reidel*, 402 U.S. 351, 91 S. Ct. 1410 (1971).

Following the analysis in *Sewell v. State* that "[i]t has been held many times by both this court and the United States Supreme Court that obscene material does not come within the protection of the First Amendment," *Sewell*, 238 Ga. at 496, 233 S.E.2d at 189, the court in *Chamblee Visuals* states that the "constitutional propriety of O.C.G.A. § 16-12-80(c) is, therefore, clear." *Chamblee Visuals*, 270 Ga. at 34, 506 S.E.2d at 115. In their decisions the Georgia appellate courts have followed the consistent line of United States Supreme Court cases that indicate "that the protected right to possess

obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others." *12 200-Foot Reels of Super 8 mm. Film*, 413 U.S. at 128, 93 S.Ct. at 2669. *See also Thirty-Seven (37) Photographs, supra*; *Reidel, supra*. Also remaining consistent with United States Supreme Court decisions are recent cases in the Eleventh Circuit. Both *Lofton* and *Williams*, the controlling authority in the Eleventh Circuit on the issue, conclude that *Lawrence v. Texas* does not create a new fundamental right to private sexual intimacy. Further, *Williams*, which upholds the constitutionality of an Alabama statute prohibiting the commercial distribution of any device primarily used for stimulation of human genitals, states that there is "nothing 'private' or consensual' about the advertising and sale of a dildo." *Williams*, 378 F.3d at 1238 n.8.

While the Eleventh Circuit and the dissent in *Lawrence* have determined that the *Lawrence* decision does not create a new fundamental right, the Superior Court of Cobb County, the Georgia appellate courts, the Eleventh Circuit Court of Appeals and this Court have all specifically held that there is no right to sale or distribute obscene material. Because the main case that Petitioners rely on, *Lawrence*, does not create a new fundamental right to private sexual intimacy, as discussed above, and even if it did there is "nothing 'private' or 'consensual' about the advertising and sale of a dildo," Petitioners have no support for their assertion that the Georgia statute violates their substantive due process rights. *Id.* Petitioners writ of certiorari should be denied because this case presents no conflict with any decision of this Court or any other court.

V. It Is Not Necessary To Reach The Constitutional Issues In This Case.

No constitutional issues were ever ruled on or addressed by any lower court in this case. As evidenced in the Discussion of Facts and Course of Proceedings Below and the Factual Issues in Record Below sections of this Brief in Opposition, this case has been decided on the facts, that the Petitioners expressly violated written, signed contracts in which they agreed to not sell items "sold or marketed primarily for stimulation of human genital organs." (Petitioners' Appendix, 69a, 78a) Further, the Superior Court in this case and the Supreme Court of Georgia in *Inserection v. City of Marietta*, 278 Ga. 170, 598 S.E.2d 452 (June 7, 2004), which did not reach any constitutional issues, found that the appeals of Petitioners are moot due to the expiration of the business licenses. Since no lower court ruled on anything other than the facts in this case, it is not necessary for this Court to reach the constitutional issues in this case. Because there are no constitutional issues or questions of federal law pending in this case, Petitioners' writ of certiorari should be denied.

VI. Petitioners' Licenses Were Revoked Due To Contract Violations

In their second point Petitioners discuss "past, alleged criminal law violations" and "past obscenity convictions" which would constitute a "classic prior restraint." (Petition 16-17) Stating that there have been "past, alleged criminal law violations" in this case and referring to "past obscenity convictions" are factual inaccuracies. *Id.* There have been no alleged criminal law violations at any level in this case nor were the Petitioners' business licenses revoked due to

alleged criminal law violations or past obscenity convictions. The licenses were revoked based on the facts in the record, more particularly, that the Petitioners violated written, signed stipulations which were part of the licenses and to which Petitioners agreed. A violation of such stipulations constitutes a breach of contract and violation of the business licenses. In no way does such a breach of contract relate to the prior restraint of future lawful expression and the First Amendment. Because there are no such constitutional issues in this case, the request for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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EXHIBITS

EXHIBIT A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

November 4, 2004

Mr. Douglas R. Haynie
222 Washington Avenue
Marietta, GA 30060

Re: 1690 Cobb L.L.C, d/b/a/ Waterpipe World, Inserection, A Fantasy Store, and Erik Clabaugh v. City of Marietta, Georgia, et al.
Application No. 04A381

Dear Mr. Haynie:

The application for a stay of enforcement of judgment pending the filing and disposition of a petition for writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on November 4, 2004 denied the application.

Exhibit A

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by s/ Troy D. Cahill
Troy D. Cahill
Staff Attorney

EXHIBIT B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 6, 1997

Mr. Douglas R. Haynie
Haynie & Litchfield
222 Washington Avenue
Marietta, GA 30060-1993

Re: Mukesh Shretta and Gold Rush, III, Inc., dba Club Taj Mahal v. City of Marietta, et al.
No. 96-1970
Varsalona's Italian Restaurant, dba Boomer's, et al. v. City of Marietta, et al.
No. 96-2035

Dear Mr. Haynie:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is denied.

Sincerely,

s/ William K. Suter
William K. Suter, Clerk